No. 105, Original

In The
Supreme Court of the United States
October Term, 1985

Before The Honorable Arthur L. Littleworth,
Special Master

State of Kansas

Plaintiff,

v.

State of Colorado

Defendant,

and

United States of America

Defendant-Intervenor.

FIRST AMENDED COMPLAINT
(Filed Nov. 13, 1989)

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November 10, 1989

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October Term, 1985

Before The Honorable Arthur L. Littleworth,
Special Master

STATE OF KANSAS

Plaintiff,

v.

STATE OF COLORADO

Defendant,

and

UNITED STATES OF AMERICA

Defendant-Intervenor.

FIRST AMENDED COMPLAINT

The State of Kansas, by its Attorney General, the Honorable Robert T. Stephan, brings this suit against the Defendant, State of Colorado, and for its cause of action states:

1. The jurisdiction of the Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28 of the United States Code.

2. The Arkansas River is an interstate river which rises near Leadville, Colorado and flows south to Salida, Colorado, east through Canon City and Pueblo, and across southeastern Colorado into the State of Kansas.

3. In order to resolve existing and future controversies and to divide and equitably apportion the water of the Arkansas River, Congress consented to the negotiation of a compact by the states of Colorado and Kansas. Act of April 19, 1945, 59 Stat. 53. Subsequently, the Arkansas River Compact was ratified by the State of Colorado by the Act of February 19, 1949, Colo. Rev. Stat. 1963, § 149-9-1; the State of Kansas ratified the Compact by the Act of March 7, 1949, Kansas Gen. Stat. Ann. 1964, § 82a-520. The Compact was approved and enacted into federal law by the Act of Congress of May 31, 1949, 63 Stat. 145. A copy of the Arkansas River Compact was attached as Appendix A to the original Complaint in this action.

4. The principal purpose of the Arkansas River Compact was to "[e]quitably divide and apportion . . . the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes." 63 Stat. 145, 145, art. I.

5. While expressly recognizing the possibility of offsetting postcompact development of the waters of the Arkansas River by new regulation or increased efficiency, the Compact mandates "that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the

water users in Colorado and Kansas . . . by such future development or construction." 63 Stat. 145, 147, art. IV(D).

6. The Compact provides that "Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities. . . ." 63 Stat. 145, 148, art. V(F).

7. Through the actions of its officers, agents and political subdivisions, the State of Colorado and its water users have materially depleted the usable and available stateline flows of the Arkansas River since the adoption of the Compact.

8. In spite of its duties and obligations under the Compact, since 1949 the State of Colorado has allowed and permitted substantial increases in the diversion and use in Colorado of the surface and hydrologically related ground waters of the Arkansas River, without the concomitant regulatory or conservation measures that the Compact requires to protect the states against material depletions in usable stateline flows.

9. The lack of effective administrative practices in Colorado has encouraged rather than retarded the development of postcompact depletions of the waters of the Arkansas River Basin and has resulted in ongoing, material depletions of the usable flows of the Arkansas River and substantial and irreparable injury to Kansas water users.

10. For more than twenty years, the State of Colorado has investigated and known the impact of the ground water appropriations in the Arkansas River Basin in Colorado. Approximately 150,000 acre feet per year of ground water related to the Arkansas River has been appropriated in Colorado since 1949, and the State of Colorado has intentionally disregarded the findings of its investigations to the effect that such appropriations directly and materially reduce the usable flow and availability of the Arkansas River in Colorado and Kansas. By its acquiescence in the postcompact proliferation of ground water diversions and its failure to administer the priorities of postcompact ground water diversions with existing surface diversions, Colorado has breached and continues to breach its obligations and responsibilities under the Arkansas River Compact.

11. Since the adoption of the Compact, the State of Colorado has attempted to unilaterally impede the bilateral action of the Compact Administration intended to protect Kansas' Compact apportionment and has failed to apply and administer its internal laws in order to meet its obligations under the Compact.

12. Pursuant to Article VIII(H), the Arkansas River Compact Administration has conducted an investigation of alleged Compact violations. The State of Colorado, however, through its Compact Commissioner, has rejected and continues to reject the State of Kansas' requests to investigate the impact on the Arkansas River of: 1) Colorado's substantial, postcompact ground water depletions of surface flows at the stateline; 2) the failure of Colorado to administer ground water priorities against surface priorities; 3) Colorado's artificially transferring

water from the storage pool in Trinidad Reservoir to the sediment pool and then refilling the storage pool to the detriment of downstream users; 4) the consequences of future increases in the consumption of Colorado's transmountain return flows; and 5) Colorado's unilateral rejection of the Arkansas River Compact Administration's Resolution of July 24, 1951, requiring that any reregulation of the native water of the Arkansas River be approved by the Compact Administration. Additionally, the State of Colorado refuses to enjoin its postcompact ground water appropriations and resulting surface depletions during the pendency of investigation of the effects of such appropriations, in spite of the irrefutable fact that those appropriations materially deplete the usable and available flows of the Arkansas River. Accordingly, the State of Colorado has used and will continue to use the pending administrative investigation as the basis for prolonging the substantial and irreparable injury to the State of Kansas by wrongfully depriving the State of Kansas and its citizens of the waters of the Arkansas River to which they are entitled under the Compact.

13. The State of Colorado has failed and continues to fail to make deliveries of releases to which Kansas is entitled from John Martin Reservoir by an equivalent in stateline flow, as required by Article V(E)3 of the Compact, and in violation of Articles V(E)4 and V(H)2.

14. Grave and irreparable injury to the State of Kansas and its citizens who were entitled to receive and use the water apportioned to them by the Arkansas River Compact has been caused by the acts and conduct of the State of Colorado, its officers, citizens, and political subdivisions in failing, neglecting, and refusing to deliver

water to Kansas in the usable and available quantities apportioned to it by the Compact.

15. Grave and irreparable injury will be suffered in the future by the State of Kansas and its citizens unless relief is afforded by this Court to prevent the State of Colorado, its officers, citizens, and political subdivisions from using and withholding water which Kansas is entitled to and which Colorado has heretofore agreed to deliver pursuant to the terms and provisions of the Arkansas River Compact.

16. The State of Kansas has sustained damages as follows:

(a) General damages arising from breach of the Arkansas River Compact by the State of Colorado, consisting of the value of Kansas' apportioned share of the Arkansas River lost to Kansas as a result of Colorado's depletions of the Arkansas River resulting from its violations of the Arkansas River Compact in an amount to be proved at trial.

(b) Special damages arising from breach of the Arkansas River Compact by the State of Colorado consisting of depletions of the Ogallala aquifer, a non-renewable resource, in the State of Kansas, resulting from Colorado's violations of the Arkansas River Compact in an amount to be proved at trial.

17. The State of Kansas has no effective remedy to enforce its rights under the Arkansas River Compact against the State of Colorado other than through the exercise of original jurisdiction in this case.

WHEREFORE, the State of Kansas respectfully prays that the Court issue its decree commanding the State of Colorado, its officers, citizens, and political subdivisions to deliver the waters of the Arkansas River in accordance with the provisions of the Arkansas River Compact and providing for such other and further relief as the Court may deem appropriate; and WHEREFORE, the State of Kansas prays that the Court award all general and special damages resulting from violations of the Arkansas River Compact by the State of Colorado, and for all other relief that the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that I caused a copy of the foregoing Kansas' First Amended Complaint to be served by federal express this 10th day of November, 1989 to:

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